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Canadian Constitutional Law

CASEBOOK – Volume 1

2015-2016

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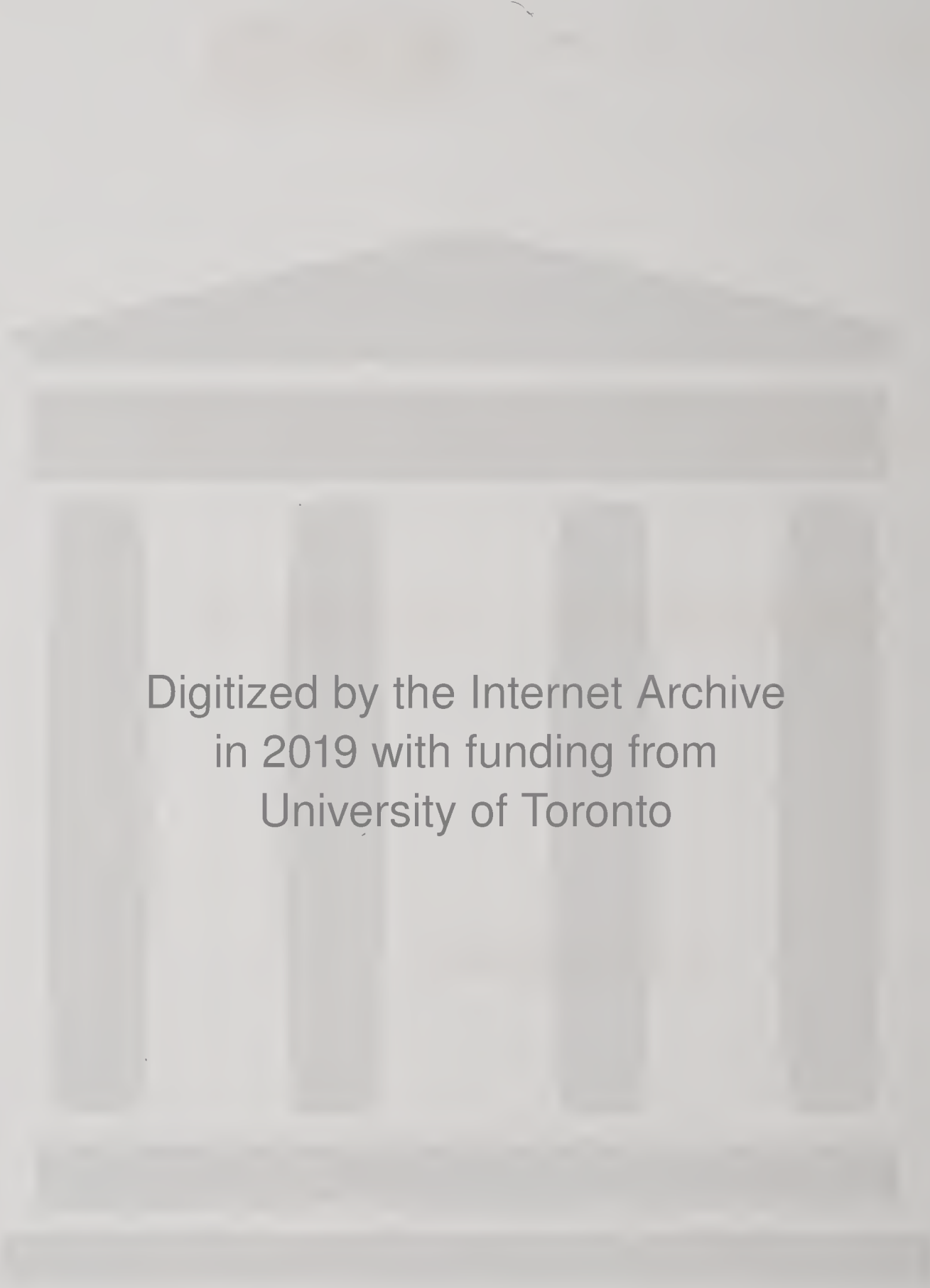
Canadian Constitutional Law

CASEBOOK – Volume 1

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Syllabus

Canadian

Constitutional Law

(Revised February 2015)

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.



Canadian Constitutional Law

SCOPE OF THE COURSE

Constitutional law is distinguished by what it does (it creates the organs of the state and defines and limits their powers) and by its status (it is the supreme law with which all other laws and government actions must comply). The goal of this course is to provide candidates with an introduction to the various components of Canadian constitutional law, and to the basic principles necessary for understanding and applying the provisions of the constitution in legal practice.

The readings begin, in Part I of the course, with an introduction to the nature and sources of the Canadian constitution, followed by an overview of the procedures for amending the constitution, an introduction to the federal nature of the Canadian state, the role of the judiciary in upholding the federal division of legislative powers, and general principles of constitutional interpretation.

In Part II, the readings explore the division of legislative powers in sections 91-95 of the *Constitution Act, 1867* in detail. The readings here begin with an examination of the doctrine of federal paramountcy, and then turn to a study of a handful of the most important legislative powers, including the federal powers in relation to “peace, order and good government” [opening language of s.91], “trade and commerce” [s.91(2)], and “criminal law” [s. 91(27)]; and the provincial power in relation to “property and civil rights in the province” [s.92(13)].

In Part III of the course, the readings examine the rights and freedoms protected by the Canadian constitution, including the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*). The readings in Part III begin with an examination of the language rights protected by the *Constitution Act, 1867*, the *Charter*, and the *Manitoba Act*. The next topic is the distinct constitutional position of Aboriginal peoples. The readings here examine federal and provincial powers to pass laws in relation to Aboriginal peoples and lands, and the Aboriginal and treaty rights entrenched in s.35 of the *Constitution Act, 1982*. The readings then focus on four of the most important rights-protecting provisions of the *Charter* – freedom of conscience and religion [s.2(a)], freedom of expression [s.2(b)], life, liberty and security of the person [s.7] and equality rights [s.15] – as well as the provisions dealing with the application of the *Charter* [s.32], reasonable limits [s.1], the notwithstanding clause [s.33] and remedies [s.24, s.52].

EXAMINATION

The examination for this course will be a three-hour open book examination. The examination may consist only of problem questions, or it may consist of a mix of problem questions, short answer questions and short essay questions.

A typical problem question will describe an actual or fictional statute (or other government action), and ask candidates to assess whether it is consistent with the provisions of the *Constitution Act, 1867* and/or the *Constitution Act, 1982*, and, if not, what the consequences are likely to be. Problem questions test a candidate's ability to identify constitutional issues, accurately state the applicable legal rules, apply those rules to novel situations, cite relevant case law, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of constitutional rules to specific fact situations. For candidates who lack experience answering such examination questions, familiarizing yourself with them through practice is essential. Candidates should practice by testing themselves, using the sample examination and perhaps by reviewing other samples of recent Canadian constitutional law examinations. Many Canadian law school libraries have copies of recent examinations on file. In addition, many Canadian law schools make examinations available online and some Canadian constitutional law professors have course websites with sample examinations and model answers.

Short answer questions, which may be in a true/false format, test candidates' ability to succinctly and correctly evaluate statements about the content of Canadian constitutional law, as in the following example:

Question: Indicate whether the following statement is true or false, and cite the case listed on the syllabus that best supports your answer: Pursuant to the “general regulation of trade” branch of its power to enact laws in relation to trade and commerce in s.91(2) of the *Constitution Act, 1867*, Parliament may enact a comprehensive regulatory scheme aimed at promoting fair competition in intraprovincial and interprovincial trade.



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Answer: True. Relevant case listed on the syllabus: *General Motors v. City National Leasing*.

Short essay questions test whether candidates have critically engaged with the material listed in the syllabus, have started to form their own opinions about the strengths and weaknesses of Canadian constitutional law, and are able to articulate and defend those opinions (e.g.: "Would you favour the repeal of s.33 of the *Canadian Charter of Rights and Freedoms*?").

REQUIRED READINGS

The required readings under each topic consist of the applicable provisions of the text of the constitution, leading cases from the Supreme Court of Canada (and a few from other courts), and relevant chapters (or parts of chapters) from the leading English-language textbook on Canadian constitutional law: Peter Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: Carswell, published in a revised version annually) (this textbook is referred to below as "Hogg").

The case law you are required to read is accessible in case reporters in law libraries – for example, Supreme Court of Canada rulings are reported in the Canadian Supreme Court Reports (S.C.R.). You may access the full text of all court rulings listed below at <http://scc.lexum.org> (for Supreme Court of Canada judgments), or at <http://canlii.org> (for other Canadian court rulings), or at <http://www.bailii.org/uk/cases/UKPC/> (for Privy Council rulings). All of the court rulings listed in the required readings below are hyperlinked to the full text available online.

Candidates should purchase a copy of the most recently published student edition of Professor Hogg's textbook. The student edition contains all of the chapters included in the required readings below. Professor Hogg's book is also available in law libraries in a loose-leaf format updated annually. Candidates are advised to use the most recent student edition of the Hogg book (or the loose-leaf version) when completing the readings below, because it will contain the most up-to-date analysis of recent developments.

Candidates should make regular reference to the texts of Canadian constitutional documents relevant to the topics covered in this course, especially the provisions of the *Constitution Act, 1867* and the *Constitution Act, 1982* that are included on the list of required readings below. The key provisions are excerpted in Appendices I and III of the Hogg textbook. The full text of the Constitution Acts of 1867 and 1982 can also be found on the Department of Justice website at <http://laws-lois.justice.gc.ca/eng/Const/index.html> and on the website of the Canadian Legal Information Institute at <http://www.canlii.org>. For those who are interested in purchasing a separate volume containing a more comprehensive collection of constitutional documents (it is not necessary to do so), the best volume is BW Funston and E Meehan, *Canadian Constitutional Documents Consolidated*, 2d ed (Toronto: Carswell, 2007). The Department of Justice also publishes a handy volume entitled *A Consolidation of the Constitution Acts 1867 to 1982*, available online at http://laws-lois.justice.gc.ca/PDF/CONST_E.pdf.

Candidates should aim to develop an understanding of the basic principles of Canadian constitutional law that starts with the text of the *Constitution Acts* and is then deepened and extended by the principles developed through judicial interpretation of the text evident in the leading cases listed on the syllabus. In light of the sparse language of the constitutional text, the bulk of Canadian constitutional law is a product of judicial interpretation set out in the reasons in particular cases or reference opinions.

The Hogg textbook should serve to provide historical context and clear summaries of the law. However, candidates are warned against focusing their study exclusively on the readings from the Hogg textbook. While the Hogg textbook is a useful resource, it is important to give greater attention to the study of the constitutional provisions and the leading judicial decisions listed on the syllabus. The assigned cases set out authoritative statements of the content of Canadian constitutional law. The law cannot be derived from a study of the text of the *Constitution Acts* and the Hogg textbook alone. Candidates should also be alert to instances where the views expressed in the Hogg textbook are at odds with judicial opinions or are incomplete because the textbook has not yet been updated to reflect the latest judicial rulings listed on the syllabus.

The examination will test knowledge derived from all three sources – from the constitutional provisions themselves, from the case law, and from the Hogg textbook. An adequate understanding of and capacity to work with Canadian constitutional law requires a knowledge base that is a combination of the constitutional text, the case law and scholarly analysis.



TOPICS TO BE COVERED AND REQUIRED READINGS

The outline that follows gives the full requirements of the course. All of the required readings are examinable. As described above, the course is divided into three parts: basic concepts, distribution of powers and rights and freedoms.

The references to the chapters in the Hogg textbook below use the chapter numbers from the latest student edition.

I. BASIC CONCEPTS

1. Sources and Nature of the Constitution

Hogg, chapter 1, "Sources"

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

2. Amending Procedures

Constitution Act, 1982, Part V, ss.38-49

Hogg, chapter 4, "Amendment", and chapter 5.7, "Secession"

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

3. Federalism

Constitution Act, 1867, ss.91-95

Hogg, chapter 5, "Federalism"

4. Judicial Review and Principles of Interpretation

Constitution Act, 1982, s 52

Hogg, chapter 15, "Judicial Review on Federal Grounds"

R v Morgentaler, [1993] 3 SCR 463

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3

Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 SCR 536



II. DISTRIBUTION OF POWERS

5. Paramountcy

Hogg, chapter 16, "Paramountcy"

Rothmans, Benson & Hedges Inc. v Saskatchewan, 2005 SCC 13, [2005] 1 SCR 188

6. Property and Civil Rights

Constitution Act, 1867, s.92(13)

Hogg, chapter 21, "Property and Civil Rights"

Citizens' Insurance Company of Canada v. Parsons, (1881) 7 A.C. 96 (P.C.)

Chatterjee v Ontario (Attorney General), 2009 SCC 19, [2009] 1 SCR 624

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

7. Trade and Commerce

Constitution Act, 1867, s.91(2)

Hogg, chapter 20, "Trade and Commerce"

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

8. Peace, Order and Good Government

Constitution Act, 1867, s.91 (opening words)

Hogg, chapter 17, "Peace, Order, and Good Government"

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401

9. Criminal Law

Constitution Act, 1867, s.91(27), s.92(15)

Hogg, chapter 18, "Criminal Law"

Margarine Reference (Reference re Validity of Section 5 (a) Dairy Industry Act), [1949] S.C.R. 1

Reference re Firearms Act (Can.), [2000] 1 SCR 783

Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 SCR 457



III. RIGHTS AND FREEDOMS

10. Language Rights

Constitution Act, 1867, s.133

Manitoba Act, 1870, s.23 (quoted in Hogg, chapter 56, note 40)

Constitution Act, 1982, ss.16-23

Hogg, chapter 56, "Language"

11. Aboriginal and Treaty Rights

Constitution Act, 1867, s.91(24)

Constitution Act, 1982, s.25, s.35

Hogg, chapter 28, "Aboriginal Peoples"

R. v. Van der Peet, [1996] 2 S.C.R. 507, per Lamer C.J., paragraphs 1-94

R v Marshall, [1999] 3 SCR 456

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511

Tsilhqot'in Nation v British Columbia, 2014 SCC 44, [2014] 2 SCR 256

12. Interpreting the Charter of Rights and Freedoms

Hogg, chapter 36, "Charter of Rights"

13. Application of the Charter of Rights and Freedoms

Constitution Act, 1982, s.32

Hogg, chapter 37, "Application of Charter"

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, paragraphs 19-52

Greater Vancouver Transportation Authority v Canadian Federation of Students, 2009 SCR 31, [2009] 2 SCR 295, paragraphs 13-24

14. Override of Rights

Constitution Act, 1982, s.33

Hogg, chapter 39, "Override of Rights"

Ford v Quebec (Attorney General), [1988] 2 S.C.R. 712, Part V of the Court's opinion, paragraphs 23-36

15. Limitation of Rights

Constitution Act, 1982, s.1

Hogg, chapter 38, "Limitation of Rights"

R v Oakes, [1986] 1 SCR 103, per Dickson C.J., Part V of his opinion, paras. 62-79

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, per McLachlin C.J. at paragraphs 35-104, per Abella J. at paragraphs 133-176



16. Freedom of Conscience and Religion

Constitution Act, 1982, s.2(a)

Hogg, chapter 42, "Religion"

Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551, per Iacobucci J., paragraphs 1-104

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698, paragraphs 47-60

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, per McLachlin C.J. at paragraphs 28-34, per Abella J. at paragraphs 125-132

R v NS, 2012 SCC 72, [2012] 3 SCR 726

17. Freedom of Expression

Constitution Act, 1982, s.2(b)

Hogg, chapter 43, "Expression"

Montréal (City) v 2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 SCR 141

Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11, [2013] 1 SCR 467

18. Life, Liberty and Security of the Person

Constitution Act, 1982, s.7

Hogg, chapter 47, "Fundamental Justice"

Canada v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134

Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101

Carter v Canada, 2015 SCC 5

19. Equality Rights

Constitution Act, 1982, s.15

Hogg, chapter 55, "Equality"

Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143

R. v Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483

Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396

20. Remedies

Constitution Act, 1982, s.24, s.52

Hogg, chapter 40, "Enforcement of Rights"

Vriend v. Alberta, [1998] 1 S.C.R. 493, per Iacobucci J., paragraphs 129-179

Vancouver (City) v Ward, 2010 SCC 27, [2010] 2 SCR 28



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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (www.canlii.org). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexus Nexis. Access requires a unique User ID and password, which will be emailed to you once you have completed registration for NCA exams (www.lexisnexis.com/ca/legal). The first time you sign in to Quicklaw you will be asked to change or personalize your password. Remember your User ID and password are personal, and should not be shared with anyone.

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